FILED
8-15-17
04:59 PM

BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3	I.12-10-013 (Filed October 25, 2012)
And Related Matters.	A.13-01-016 A.13-03-005 A.13-03-013 A.13-03-014

ALLIANCE FOR NUCLEAR RESPONSIBILITY'S SUMMARY OF POSITION AND PROCEDURAL RECOMMENDATION

JOHN L. GEESMAN

DICKSON GEESMAN LLP
1999 Harrison Street, Suite 2000
Oakland, CA 94612
Telephone: (510) 899-4670
Facsimile: (510) 899-4671
E-Mail: john@dicksongeesman.com

Attorney for
ALLIANCE FOR NUCLEAR RESPONSIBILITY

Date: August 15, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CALIFORNIA PUBLIC UTILITIES COMMISSION RULES

CALIFORNIA PUBLIC UTILITIES COMMISSION DECISIONS

OTHER AUTHORITIES

I. INTRODUCTION.

Pursuant to the December 13, 2016 Joint Ruling of Assigned Commissioner and Assigned Administrative Law Judge Directing Parties to Provide Additional Recommendations for Further Procedural Actions and Substantive Modifications to Decision 14-11-040 ("December 13, 2016 Joint Ruling"), as modified by the May 26, 2017 Administrative Law Judge's Ruling Granting Motion of the Meet and Confer Parties to Extend Dates for All-Party Meet and Confers, and Request Additional Information from Utilities, the Alliance for Nuclear Responsibility ("A4NR") respectfully submits its summary of individual position and its recommendation for further procedural actions by the California Public Utilities Commission ("Commission").

After extensive meet-and-confer discussions, multiple mediation sessions conducted by nationally acclaimed mediators, and good faith efforts by the ratepayer parties and both utilities ("SCE" and "SDG&E"), significant differences remain over the scope of required modifications to D.14-11-040 in the aftermath of the SCE misconduct sanctioned by the Commission in D.15-12-016. Importantly, both utilities have publicly acknowledged that the pending application for rehearing of D.14-11-040 enables a refund of collections and precludes utility objection based upon retroactive ratemaking doctrine.[1]

A4NR attributes the present inability of the two sides to reach agreement to (1) divergent assessments of the Commission's interest in correcting the unjust and unreasonable rates which resulted from the impaired D.14-11-040; (2) differing opinions of the likelihood and scope of any due process remedies ordered through the federal courts as a result of pending

[1] February 28, 2017 Response of SCE and SDG&E to the Coalition to Decommission San Onofre's Motion to Stay D.14-11-040 and Its Implementation, p. 3.

litigation in the U.S. Court of Appeal for the Ninth Circuit; and (3) unavoidable uncertainty over the potential for criminal prosecutions of past or present SCE and/or Commission personnel while the statute of limitations for Cal. Penal Code §182(a)(5) remains unexpired.

II. SUMMARY OF A4NR POSITION.

A4NR recommends the Commission exercise its authority under Cal. Pub. Util. Code §1708 to rescind, alter or amend D.14-11-040. As the December 13, 2016 Joint Ruling confirmed, "there clearly were 'extraordinary circumstances' present in Edison's failure to disclose …"[2] Reopening the settlement falls squarely within the Commission's traditional interpretation of its §1708 authority, as exhaustively articulated in D.97-04-049. In reappraising the merit of the D.14-11-040-approved settlement, especially the cancellation of the intended I.12-10-013 utility prudence review, the Commission should also take particular note of "a persuasive indication of new facts or a major change in material circumstances, which would create a strong expectation that we would make a different decision based on these facts or circumstances."[3] A4NR is aware of four such developments since the adoption nearly three years ago of D.14-11-040.

A. MITSUBISHI ARBITRATION FIASCO.

D.14-11-040 avoided specifying the precise amount the Commission assumed would be recovered by ratepayers from the much-anticipated Mitsubishi ("MHI") arbitration, but the September 5, 2014 Assigned Commissioner and Administrative Law Judges' Ruling could not

[2] December 13, 2016 Joint Ruling, p. 37.
[3] *Application of PG&E Co.* (1980) 4 Cal. PUC 2d 139, 150.

conceal an expectancy in the multi-hundreds of millions. Concerned about a "primary benefit to ratepayers coming only with awards in excess of $900 million" from a proceeds distribution formula it said "unfairly favors shareholders over ratepayers,"[4] the September 5, 2014 Assigned Commissioner and Administrative Law Judges' Ruling observed,

> The record indicates the primary claim is for breach of warranty focused on the actual investment in the Steam Generator Replacement Project (SGRP) (about $700 million). This claim is contested by Mitsubishi, and other consequential damages are likely to be more challenging to recover.[5]

In defending its implicit wager on the arbitration's outcome, D.14-11-040 noted on behalf of the full Commission, "we do not share the conclusions of parties who assume SCE's imprudence and failure in the arbitration. Based on the Commission's own review of facts, we do not assume the outcome is clear or will be wholly adverse to SCE."[6]

SCE helped sidestep the planned I.12-10-013 Phase 3 investigation into its own prudence by castigating MHI as the sole culprit responsible for the SONGS 2&3 demise. SCE assiduously fed the Commission's visions of arbitration sugarplums[7] with an October 16, 2013 Request for Arbitration seeking at least $4 billion in damages. Ultimately, SCE's hyperbolic arbitration claims would swell to $6.7 billion, two-thirds of which was to come during a hypothesized 2022 – 2042 relicensed period.[8] Notwithstanding SCE's extended public

[4] September 7, 2015 Assigned Commissioner and Administrative Law Judges' Ruling, p. 7.
[5] *Id.*, p. 6.
[6] D.14-11-040, p. 126.
[7] The May 9, 2016 Joint Ruling of the Assigned Commissioner and Administrative Law Judge that reopened the record to review the settlement in light of D.15-12-016 observed (at p. 2), "After deducting litigation costs, the ratepayers and shareholders will share 50% / 50% in all recovery from the pending multi-billion dollar arbitration claim against Mitsubishi." The December 13, 2016 Joint Ruling directed the parties (at p. 38) to consider "possible reconfiguration of the potential MHI arbitration award to allow further ratepayer benefits as an offset for any tipping of the balance in the Utilities' favor that resulted from the unreported *ex parte* communications."
[8] International Chamber of Commerce ("ICC") Arbitration Case No. 19784/AGF/RD, Final Award, §773.

vilification of MHI, which successfully deflected Commission interest from even starting Phase 3 of I.12-10-013, the ICC Tribunal's Final Award declared MHI the prevailing party[9] and vitiated virtually all of SCE's factual and legal claims except for entitlement to liquidated damages from breach of a limited warranty concerning tube supports. Due to applicable principles of collateral estoppel, the Final Award's determinations against SCE – made after an encyclopedic adversarial process that cost a mind-numbing $149,058,112.85[10] in total – establish a formidable evidentiary foundation for a Commission finding of imprudence in SCE's post-leak conduct. The ICC Tribunal's most pertinent determinations, after SCE and SDG&E expended a massive litigation arsenal in futile pursuit of MHI, were

> • … SCE, by its actions, frustrated the fulfillment of the various contractual remedies available to it, following discovery of the causes of the Incident. When SCE decided to shut down the plant without pursuing the proposed Type 1 repair or a replacement option, it must be deemed to have elected, on its own, to forego the consideration for which Edison had bargained. (¶ 2720)
>
> • … SCE unilaterally placed unreasonable limitations on MHI's proposed Type 1 Repair, then later refused to pursue the replacement option suggested by MHI, and further elected not to pursue in any way the default or back charge options in the Warranty. (¶ 2615)
>
> • … After the leak occurred, MHI acted diligently to pursue repair and replacement options, but SCE discouraged these efforts and placed unreasonable requirements on MHI's Type 1 Repair efforts. (¶ 2594)
>
> • … MHI did not ignore its obligation to repair or replace. Rather, MHI was unable to repair or replace the RSGs due to Claimants' conduct and choices. Notably, as

[9] Final Award, ¶ 2859.

[10] The Final Award identifies attorneys' fees and expenses of $43,971,832.62 for the MHI-affiliated parties (¶ 2862) and $44,572,149.20 for the SCE-affiliated parties (¶ 2839); experts' fees and expenses of $12,889,075.10 for the MHI-affiliated parties (¶ 2865) and $29,655,136.10 for the SCE-affiliated parties (¶ 2839); other expenses -- direct costs incurred towards consultants, interpreters, court reporting services, document translation services, E-discovery services, document processing and hyperlinking, site visit by the Tribunal, arbitration facilities (hotel), copying and printing, data hosting, documenting reviewing, ICC fees, litigation support services, translation and interpretation, and travel and lodging -- of $4,665,851.23 for the MHI-affiliated parties (¶ 2866) and $9,804,068.60 for the SCE-affiliated parties (¶ 2839); and separate ICC costs of $3,500,000 (¶ 2867).

determined above, the Claimants rejected a Type 1 repair that the Claimants could have considered as an interim repair in favor of a longer term replacement option and stronger negotiating/litigation position. This strategic choice proved untenable following the decision of the ASLB, which led to the shutdown decision. (¶ 2558)

• The Tribunal finds that the proposed thicker AVB repair would have corrected the root cause of the RSG defects, and that the concerns raised by the AREVA report could have been addressed, such that Unit 3 could have been repaired and that no new forms of degradation would have materialized. (¶ 2282)

• Delays in proceeding with a Type 1 Repair were incurred on account of SCE's lack of interest, demonstrated by taking unreasonable positions, in preference for pushing the Respondents into proposing a replacement option which SCE rejected and, potentially, developing a stronger litigation/negotiation position. (¶ 2251)

The most obvious rate ramifications of SCE's "unreasonable" thwarting of a viable MHI repair[11] are threefold: 1) should SCE and SDG&E be allowed to recover their investment (and a return thereon) in base plant which SCE's "lack of interest" and "unreasonable positions" prevented from returning to commercial operation?[12] 2) should SCE and SDG&E be allowed to bill ratepayers for the additional costs of AB 32 compliance caused by the insufficiency of free allowances received in the Air Resources Board allocation, which had assumed SONGS 2&3 would operate?[13] 3) should SCE and SDG&E shareholders bear cost responsibility for the additional transmission "fixes" necessitated by the SONGS 2&3 closure?[14]

B. ABANDONMENT OF NEIL PROPERTY DAMAGE CLAIMS.

SCE prioritized its litigation against MHI over pursuit of the SONG 2&3 property damage

[11] See Final Award, ¶¶ 2123, 2125 and 2126.
[12] D.14-11-040 estimated the 2014 present value of the base plant revenue requirement as $1.319 billion.
[13] Using the 9 million metric ton estimate of annual emissions identified in D.14-11-040 at p. 119, and the $12.74 unweighted average price from the Air Resources Board's first 11 auctions, this burden will exceed $917 million during the 2013 – 2020 compliance period. This calculation leaves SONGS shutdown-related emissions in 2012 and 2021-2022 unaddressed.
[14] A4NR estimates the combined total for SCE and SDG&E to exceed $200 million.

coverage under insurance policies issued by Nuclear Electric Insurance Limited ("NEIL"),[15] and subject to a $2.75 billion policy limit. While SCE's design defect arguments against MHI (forcefully rebuked in the ICC Tribunal's Final Award) may have been inconsistent with exclusions under the NEIL policies, not unusual when pursuing alternate recovery theories against separate respondents, SCE apparently failed to toll the deadlines of one process will awaiting the outcome of the other. SCE has attempted to downplay its abandonment of claims under the NEIL property damage coverage, which it formalized in the course of settling a much smaller claim under the NEIL outage policy, and publicly announced the move for the first time in the last sentence of a footnote to the company's Response to the May 9, 2016 Joint Ruling of the Assigned Commissioner and Administrative Law Judge.[16] Although NEIL appears to have granted deadline extensions to SCE more than once, it is unclear whether SCE ever actually filed a proof of claim under the property damage coverage.[17]

Some of the more aggressive terms of the settlement agreement approved by D.14-11-040 are found in Section 4.11's immunization of SCE's decisions regarding claims against MHI and NEIL from oversight.[18]

---

[15] NEIL is a mutual insurance company whose members have, or had at the time of joining, an insurable interest in a commercial nuclear power generation plant.

[16] SCE Response to May 9, 2016 Joint Ruling of the Assigned Commissioner and Administrative Law Judge, p. 22, footnote 64.

[17] As noted in D.14-11-040 at p. 11: "It is unclear whether the Utilities are pursuing additional claims under the accidental property damage coverage, arising from facility damage related to the eventual shut down of the SONGS plant."

[18] • Section 4.11(f) affords: "complete discretion to settle, compromise, or otherwise resolve claims against NEIL and/or Mitsubishi in any manner and whenever the Utilities determine, in the exercise of their business judgment, without prior or subsequent review or approval, disapproval, or disallowance by the CPUC or any parties to this OII, except as provided in 4.11(g)(ii)(y)."

• Section 4.11(g) cloaks notification of the CPUC in confidentiality: "(i) The Utilities may provide such notification in a manner that preserves the confidentiality thereof insofar as may be reasonably necessary to further the

Arguably, SCE may have reasonably considered the ICC Tribunal an easier group to persuade than the jury of its nuclear utility peers governing the NEIL claims process. Arguably, SCE may be able to establish that it was not motivated by the difference between a 50% shareholder interest in net recovery from the MHI arbitration versus a 17.5% shareholder interest in net recovery from the NEIL property damage policies. Arguably, SCE may have exhausted all reasonable opportunities to pursue both sources of recovery before embracing a strategy that made them mutually exclusive. But the Commission should require SCE to shoulder the burden of proof, in a resumed I.12-10-013, that its choices prioritized ratepayer interests and met the Commission's prudent manager standard.

C. RECENT CORROBORATION BY MICHAEL PEEVEY.

The December 13, 2016 Joint Ruling accurately summarized the gravamen for invoking the authority to rescind, alter or amend D.14-11-040 provided by Cal. Pub. Util. Code §1708, based upon the post-D.14-11-040 discoveries of SCE misconduct confirmed by D.15-12-016:

Footnote 17 continued:

Utilities' flexibility to settle, compromise, or otherwise resolve such claims; and (ii) The CPUC shall not review the reasonableness or prudence of the Utilities' litigation, settlement, compromise, or other resolution of such claims and shall not impose any ratemaking adjustment in respect of such claims except (x) as expressly provided in this Agreement, and (y) the CPUC may review SONGS Litigation Costs to ensure they are not exorbitant in relation to the recovery obtained."

• Section 4.11(h) enables advance notice only to other Amended Settlement signatories: "The Utilities shall each use their best efforts to provide all Settling Parties with advance notice of any such settlement, compromise, or other resolution of their claims against NEIL or MHI, to the extent possible under the circumstances and the terms of any agreement with NEIL or MHI, before the Utilities notify the CPUC or otherwise make public the agreement."

• Section 4.11(i) creates a "privileged documents" exemption from any CPUC review, which appears inconsistent with D.14-11-040's reliance (at p. 126) on the Settling Parties' assurances that "clearly ensure the Commission, through its Energy Division, will have the ability to review documentation of any resolution of third party litigation and the litigation expenses netted from the recoveries.": "The Utilities shall submit to the CPUC documentation of any final resolution of third-party litigation and documentation of SONGS Litigation Costs. The Utilities may submit such documentation subject to Public Utilities Code §583. Further, the Utilities are not required to submit privileged documents. The CPUC may review such documents to ensure that ratepayer credits are accurately calculated, and to ensure that the SONGS Litigation Costs are not exorbitant in relation to the recovery obtained."

> Here **Edison did not comply with the rules**; through its engagement in multiple unreported *ex parte* communications, **Edison tipped the balance** of negotiations in its favor and in the favor of its shareholders. **The information gained** by Edison during these unreported *ex parte* communications **provided the Utilities an unfair advantage**.[19](emphasis added)

Since its initial filing on April 27, 2015, the premise for A4NR's Petition for Modification has been that SCE utilized its unique knowledge of Commission President Peevey's position to negotiate terms significantly more generous to its shareholders than those outlined by Peevey in Warsaw. This premise was recently corroborated by the unsolicited statement, as described in Exhibit A to this filing, made by Mr. Peevey to A4NR's counsel on May 21, 2017:

> You know, I pushed Craver to take the deal but he said it was too much money. They were going to give it to Henry Weinstein, you know. What's his name? Their lawyer. And try to negotiate something. And then they ran Pickett out of the company.[20]

A4NR's Petition for Modification calculated a difference of $1.239 – 1.309 billion between the Warsaw Notes and the settlement approved in D.14-11-040, and a difference of $1.419 – 1.438 billion between the Warsaw Notes and the initially proposed settlement negotiated with TURN and ORA, noting that the amounts should be increased by whatever amount of construction work in progress ("CWIP") SCE and SDG&E accrued after December 31, 2013.[21] A4NR's estimates should be updated to reflect the recovery under the NEIL outage policy and the completion of the MHI arbitration process. Assuming that ratepayers receive

[19] December 13, 2016 Joint Ruling, p. 33.
[20] See Exhibit A to this filing, Declaration of John L. Geesman and attachment. Mr.Craver's successor as EIX President and Chief Executive Officer, Pedro Pizarro, told financial analysts on May 1, 2017, "the late-notice *ex parte* discussion between the former CPUC president and a former SCE executive had zero impact on the 10 months of negotiations among the settlement parties." https://seekingalpha.com/article/4067664-edison-international-eix-q1-2017-results-earnings-call-transcript, p. 3.
[21] A4NR PFM, Exhibit A, p. 11.

nothing from the MHI arbitration Final Award after litigation costs are reimbursed,[22] A4NR's estimates should be revised to a difference of $1.237 billion between the Warsaw Notes and the settlement approved in D.14-11-040, and a difference of $1.379 billion between the Warsaw Notes and the initially proposed settlement negotiated with TURN and ORA. These revised amounts continue to require augmentation by whatever amount of CWIP SCE and SDG&E accrued after December 31, 2013.

D. UNMARKETED NUCLEAR FUEL.

Despite the clear expectation in D.14-11-040 that the SONGS 2&3 nuclear fuel, described as having a book value of $592.8 million,[23] would be sold and 95% of the net sale proceeds credited to ratepayers, no sales have yet taken place while more than half of the book value has been amortized. A4NR is concerned that the marketability of the nuclear fuel may have been materially misrepresented in the original April 3, 2013 filing of the proposed settlement. If so, and the utilities have committed Rule 1.1 violations due to their failure to correct such material misrepresentations, the $50,000 per day metric employed in D.15-12-016 would yield a combined penalty of $79.7 million as of the date of this filing.

Additionally, even if no artifice or false statement regarding nuclear fuel has been made or allowed to go uncorrected, the Commission should require SCE to justify its failure to sell any of the fuel inventory. Since the SONGS 2&3 shutdown rendered this inventory redundant to

[22] To its credit, SCE seems hesitant about the appropriateness of such an outcome and has recorded a "regulatory liability" for its full $47 million recovery under the Final Award due to "uncertainty associated with the allocation of the award under the San Onofre OII Settlement Agreement." July 27, 2017 EIX Form 10-Q, p. 6.
[23] D.14-11-040, p. 26.

SCE's operational needs, failure to liquidate such inventory (or even, apparently, to have an executable plan for such liquidation) involves market speculation. With SCE's and SDG&E's recovery of the book value of the nuclear fuel (and a return thereon) assured by D.14-11-040, is it reasonable to force captive ratepayers into such a speculative position?

III. RECOMMENDATION FOR FURTHER PROCEDURAL ACTIONS.

A4NR recommends that the Commission:

- Reinstate the Proposed Decision for Phases 1 and 1A;
- Prepare and issue a Proposed Decision for Phase 2; and
- Convene a Phase 3 Prehearing Conference to determine how to proceed with the remainder of the I.12-10-013 investigation.

A4NR also recommends that the Phase 3 Prehearing Conference be scheduled after November 25, 2017, which it calculates to be the expiration of the statute of limitations – assuming no tolling agreements have been made – for any criminal prosecutions under Cal. Penal Code §182(a)(5). *People v. Zamora* (1976) 18 Cal.3d 538, 557 P.2d 75, 134 Cal.Rptr. 784; *People v. Milstein* (2012) 211 Cal.App.4th 1158, 150 Cal.Rptr.3d 290.

Respectfully submitted,

By: /s/ John L. Geesman

JOHN L. GEESMAN
DICKSON GEESMAN LLP

Date: August 15, 2017

Attorney for
ALLIANCE FOR NUCLEAR RESPONSIBILITY

EXHIBIT A

May 21, 2017 Michael Peevey Statement

DECLARATION OF JOHN L. GEESMAN

I, John L. Geesman, declare as follows:

1. On May 21, 2017 both Michael Peevey and I were speakers at the memorial service held for Jackalyne Pfannenstiel in the auditorium of the Oakland Museum.

2. After the program finished, before going outside to the reception, Mr. Peevey and I had a brief conversation.

3. The significance of Mr. Peevey's comments did not register with me until I awoke the next morning.

4. I immediately wrote the attached email to myself in order to accurately capture my recollection of the exchange.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 2017. /s/ John L. Geesman

From: John Geesman
To: John Geesman
Subject: notes of my conversation with Mike Peevey yesterday at about 5:30 pm
Date: Monday, May 22, 2017 6:26:00 AM

Immediately after the indoor program for Jackie's memorial service ended, as the various guests and speakers milled about the front of the auditorium before going outside to the reception, I approached Mike (who I had not seen or spoken with since he left the CPUC in 2014) and told him he looked great. He said he had lost a little weight but was doing pretty well. He thanked me for the analysis I had done on San Onofre. I did not know to what, specifically, he was referring, and assumed that it was my letter to the Assembly Energy Committee after the release of the Warsaw Notes but I had also been told by Bob Weisenmiller in 2015 that Mike was aware of the briefs I had filed at the CPUC concerning the Warsaw Notes.

Mike said that Ed Randolph had also been involved with the Warsaw meeting and then stated, "You know, I pushed Craver to take the deal but he said it was too much money." I did not say anything in response and he continued, "They were going to give it to Henry Weinstein, you know. What's his name? Their lawyer. And try to negotiate something. And then they ran Pickett out of the company." I said it, referring to the CPUC proceeding, would probably go on forever. He responded, "I know you're all in negotiations now."

Mike said, "You know, we have agreed and disagreed on various issues over the years, but I have always thought of you as a straight shooter." I responded that I admired his public accomplishments. He said the media is out of control, and that's the one thing he agrees with Trump on. I said dealing with the media had been part of his job and that he would probably be vindicated in the end.

We parted. Our conversation had probably lasted about three minutes. The only other communication I have had with Mike since 2014 was a Facebook comment he made on my birthday a couple of weeks ago: "Well, birthday`s come and go and I wish you the best. And, also, recognize your lasting commitment to public service. And, thanks, for your analysis and comments on the entire San Onofre matter."

John L. Geesman

Dickson Geesman LLP
1999 Harrison Street, Suite 2000
Oakland, CA 94612
(510) 899-4670
(510) 899-4671 facsimile